No. 10383

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THOMPSON PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I

The National Labor Relations Board Appropriation Act of 1944 does not require dismissal of the Board's petition for enforcement

Respondent's contention in Point I of its brief (pp. 4–10) that this proceeding should be dismissed because of the terms of the National Labor Relations Board Appropriation Act of 1944 is governed by the recent decision of this Court in *N. L. R. B.* v. *Cowell Portland Cement Co.,* Case No. 10374. The employer there involved moved this Court to dismiss the Board's petition for enforcement, alleging that the

Appropriation Act required such dismissal. The motion was argued on September 7, 1943, before Circuit Judges Garrecht, Denman, and Healy. It was denied from the bench. The Board is advised by its counsel that the grounds of the Court's action, as indicated by statements of the members of the Court at the oral argument, are applicable here. Accordingly, we are not briefing this point. However, if the Court desires to consider this question further, we request that we be given permission to file an additional memorandum on the subject.

II

The Board's findings and order are in all respects valid and proper

Conceding, in effect, the validity of the Board's ultimate finding of company domination on the subsidiary findings made, respondent has attacked that finding solely on the basis of a claim that the Board improperly credited the testimony of two witnesses. It is thus asking this Court to reevaluate the evidence, redetermine the credibility of witnesses, and to resolve, independently of the Board's findings of fact, the conflicts in the evidence. The issues thus raised are clearly not within the scope of the review provided by Section 10 of the Act. *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 597; *N. L. R. B.* v. *Waterman Steamship Corp.,* 309 U. S. 206, 208–209, 226; *Washington, Virginia & Maryland Coach Co.* v. *N. L. R. B.,* 301 U. S. 142, 146–147; *N. L. R. B.* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, 106–107; *N. L.*

R. B. v. *Oregon Worsted* Co., 96 F. (2d) 193, 195 (C. C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. (2d) 780, 788 (C. C. A. 9); *N. L. R. B.* v. *Tovrea Packing Co.,* 111 F. (2d) 626, 630 (C. C. A. 9), cert. denied, 311 U. S. 668; *N. L. R. B.* v. *Security Warehouse and Cold Storage Co.,* decided August 17, 1943 (C. C. A. 9).

While giving lip service to these cases, respondent argues that the Board's findings are not adequately supported because of the alleged "utter worthlessness" of the testimony of Kangas and Porter (Brief, p. 25). We submit that this contention is entirely without merit.

In the first place, the Board's ultimate finding did not rest on the testimony of Kangas and Porter alone. Many of its subsidiary findings concerning the origin of the Alliance and respondent's assistance thereto are based on documentary evidence and the testimony of other witnesses.[1] Moreover, the activity of super-

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[1] E. g., in connection with respondent's expressed preference for an "inside union," the Board based its findings on the testimony of Livingstone and Drake (R. 58–59, note 8; 1235–1236; 1274–1275; 1294–1296). As to Porter's activities in initiating the formation of the Alliance, the record shows, independently of the testimony of Kangas or Porter, that Porter referred the Alliance's constitutional committee to the attorney who drew up its constitution and bylaws (R. 63, note 16: 1298); that Porter acted as spokesman for the group of employees which he led into respondent's office at Livingstone's behest, to initiate the organization of the Alliance (R. 652). In regard to respondent's interference and coercion, and domination of the Alliance, there is also much other evidence upon which the Board based findings; e. g., the testimony of Crank (R. 507–513), Smith (R. 530–536; 565–568), Spencer (R. 606–607), Baldwin (R. 1145), Overlander (R. 631–634), the "Friendly Forum" (R. 1262; 1271), and other evidence summarized at pp. 10–17 of the Board's main brief.

visory employees on behalf of the Alliance is established by unchallenged proof (Board's main brief, pp. 12–13).

In the second place, the testimony of Kangas and Porter was clearly entitled to acceptance. The two witnesses were in accord on all essential facts; even respondent is forced to admit that "they told the same story in general" (Brief, p. 15). Many of the "conflicts" and "inconsistencies" which respondent purports to find are illusory, as examination of the record will reveal.[2] A few of the bases for respondent's attack on these two witnesses may be dealt with here.

Respondent seeks to show that Porter's testimony is entitled to no credence because "he joined the union in April 1942 [R. 274], reported to the Board in the same month as to his alleged activities in organizing the Alliance in 1937 [R. 289], and the union filed its charge with the Board on May 1, 1942" (Brief, p. 13). The picture thus sought to be painted is that of a zealous C. I. O. member who rushed to the Board with a complaint immediately upon join-

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[2] For example, respondent is in error in stating that Porter testified that Kangas did not tell him why Livingstone wanted to see him at the Jonathan Club (Brief, pp. 14–15). Porter was in no way connected with the War Production Board incident (Brief, p. 14). With respect to who initiated Porter's espionage activities (Brief, p. 15), Porter testified first that he did not remember which of respondent's officials spoke to him about this matter (R. 260) and later that he did not *remember* Kangas mentioning the matter (R. 331), not that Kangas did not do so. Kangas' testimony that he broached the matter (R. 373–374) is therefore consistent with Porter's testimony, particularly in view of Porter's statement that he reported to Kangas (R. 264).

ing the Union. In fact, Porter originally joined the Union in 1937, not out of sympathy for the organization, but at respondent's behest, in order to spy upon it (R. 259–266; 373–376; 420–422). His reaffiliation in 1942 was part of a general movement in respondent's plant, when a number of members of the company-dominated Alliance, having become disillusioned with it, shifted their allegiance to the Union (R. 521–523; 576–579; 616; 618–620; 626; 638; 645. See also R. 274). Finally, Porter was *summoned* to appear before the Board by telegram, to tell what he knew about the illegal origin of the Alliance. He had not, prior to that time, had any communication with the Board (R. 289–290).

Another alleged defect in Porter's testimony relates to the naming of the Alliance (Brief, p. 14). His statement that he was with Kangas when Livingstone dictated to the latter a text for the Alliance membership application card (R. 226–227, 331), is supposed to be inconsistent with his statement that when he later visited Livingstone at the Jonathan Club, the latter asked him what name to give the organization (R. 247–248).[3] Any one of a number of reasons might have prompted Livingstone to ask Porter what the name of the organization should be: to rehearse him in the name of the organization, to discover possible reasons why the proposed name should be changed, or even to let Porter feel that he was being consulted about the matter. At any rate,

[3] When Porter said he did not know, Livingstone suggested the name he had already dictated to Kangas (R. 247–248).

there is nothing inconsistent or incredible about Porter's testimony in this connection.

Respondent produced no evidence to refute Porter's testimony that he joined the Union in 1937, at its behest, and reported on at least one meeting to Kangas, and that he was furnished with money for the payment of his dues by Hodges. As a sort of afterthought, respondent now attempts in its brief (p. 16) to cast doubt on the occurrence of this espionage, by referring to the testimony of Runyan (R. 779–780) that Porter's card "was not among those noted" when he made a check of the union cards in 1937. Aside from the fact that Runyan was "just guessing" as to whether he made a check before or after Porter joined the Union, he might well have failed to remember "noting" Porter's card.

One important issue in this case is whether Porter played a prominent role in the steps leading to formation of the Alliance (Board's main brief, pp. 7–9). On this issue, respondent offered the testimony of what it refers to as "a number of reliable witnesses" (Brief, p. 16). This testimony proved entirely worthless. Even Bebb, whose hostility to the Board was no secret (R. 624–625), corroborated Porter's testimony that it was he who, as spokesman for the group of employees who met with Livingstone on July 27 (Board's main brief, pp. 8–9), announced their desire to organize an "independent" union (R. 652). Again, despite the attempt of respondent's witnesses to give the impression that Porter was not present at the early organizational meetings of the Alliance (R. 667–668, 786, 1134), Bebb, upon being shown

Porter's signature on the first draft of the Alliance's constitution (R. 107, line 25), reversed his earlier testimony and admitted that Porter must have been present at the meeting at which the constitution was adopted (R. 679–680).

The record furnishes further independent corroboration of Porter's role as the initiator, on respondent's behalf, of the formation of the Alliance. Respondent concedes that Porter picked up the Alliance's cards from the printer (Brief, p. 17). It is not disputed that Porter referred the Alliance constitutional committee to the attorney who drew up the Alliance constitution (R. 1298). In view of the fact that none of the other early leaders of the Alliance had any clear recollection of the early steps in its origin (see, e. g., R. 677), Porter's testimony that he was the moving figure in its establishment becomes conclusive.

The case of *N. L. R. B.* v. *Sun Shipbuilding and Drydock Co.,* 135 F. (2d) 15 (C. C. A. 3), on which respondent relies (pp. 26–29), presented an entirely different situation. A consideration repeatedly stressed by the Court in arriving at its decision in that case was the "absence of employer hostility to bona fide collective bargaining" (135 F. (2d), at p. 26). It attached great importance to the fact that "at all times up to the formation of the Association, the respondent * * * had uniformly accorded to its employees the unrestricted right to bargain collectively either through affiliated or unaffiliated organizations of their own choosing" (135 F. (2d), at p. 21). Precisely the opposite situation is present here, as

shown by unquestioned evidence. Livingstone's outright expression to the plant supervisors of preference for an inside union is admitted (Board's main brief, p. 6), and whether or not, as petitioner claims (Brief, pp. 37–38), the anti-union diatribes in the "Friendly Forum" (Board's main brief, pp. 16–17) were privileged, they are nevertheless "illuminative as evidence of motive, intent, and attitude toward labor union activities of the employees." *N. L. R. B.* v. *Chicago Apparatus Co.,* 116 F. (2d) 753, 757 (C. C. A. 7). Hence, there was solid basis for the Board's resolution of the conflicting testimony of Porter and Kangas and respondent's officials. "Motive is a persuasive interpreter of equivocal conduct, and [respondent is] not entitled to complain because [its] activities were viewed in the light of manifest interest and purpose." *Texas and New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, 559.[4]

[4] The *Sun* case is also distinguishable on two other grounds. The Court there repeatedly stressed the fact that the allegedly company-dominated union had been chosen by the employees in a secret ballot (135 F. (2d), at pp. 18, 19, 22–23). No election was ever held in the instant case. Again the court noted in the *Sun* case, in considering the activities of certain "leaders" on behalf of the Association, that their activities could not be ascribed to the employer since the "leaders" are "sufficiently detached from management so as to be eligible to organize with other employees for collective bargaining purposes, and both the Association and the complaining union admitted and still do admit, such employees to membership" (135 F. (2d), at p. 20). The case at bar differs basically since the supervisory employees active in the formation and affairs of the Alliance were admittedly not eligible for membership even in the Alliance, which subsequently asked them to resign.

In sum, the Board gave careful consideration to respondent's attack on the general credibility of Kangas and Porter. For the reasons set forth by the Trial Examiner (R. 56–58, note 7) and adopted by the Board (R. 46–47), respondent's contention that their testimony was worthless was rejected. The multitude of petty details, misrepresentations of the record, and baseless insinuations contained in respondent's brief cannot on any theory be treated as proof of arbitrary action on the part of the Board. In view of the basic consistency and credibility of the testimony of Kangas and Porter, of the independent proof of hostility to unions on the part of respondent and active support of the Alliance, the Board's findings rest on a substantial foundation in the evidence, and are not, therefore, subject to review.

A few additional points made by respondent may be disposed of briefly. Respondent asserts, as proof that there was no company interference in the formation of the Alliance, that the employees "discussed" formation of an inside union before Porter, at respondent's direction, intervened in the situation (Brief, pp. 29–31). However, the very portions of the record cited by respondent in this connection show that prior to Livingstone's visit to the plant the employees had discussed, and even tentatively joined, the A. F. of L. (R. 662–663), had weighed the merits of the A. F. of L. as against a "company union sponsored * * * by Lyman Hodges * * *,"[5] had debated the merits of inside and outside unions, both A. F. of L. and C. I. O. (R. 775–776), and had arrived

[5] Hodges was then head inspector of the plant (R. 232).

at no decision. At this critical point, in order to forestall organization by the C. I. O., which, as Livingstone testified, he had been told had many adherents among the employees (R. 1230), respondent took steps to make the employees' choice for them by herding them into an inside union. In such circumstances, to talk of the Alliance as having been "formed by the employees and without any suggestion or encouragement from respondent" (Brief, p. 31) is sheer nonsense.

Livingstone's clearly expressed preference for an inside union, communicated to the meeting of supervisors (Board's main brief, pp. 5–6) is of the greatest significance, despite respondent's cavalier attempt to brush it aside as of no importance (Brief, pp. 11–12). "The employer's attitude toward unions is relevant." *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 600. Moreover, Livingstone's expression of respondent's preference as well as its threat to close down the plant if the C. I. O. came in was thereafter carried to the employees by the supervisors (R. 293–294; 390–391; 514–518; 577; 628–629; 630), who were merely "emulating the example set by the management." *International Association of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 81.

Respondent's contention (Brief, p. 11) that the Board should not have entertained the charges herein, because of the complaining union's delay in filing them, is notable in that it ignores the fact that the illegal conduct of respondent, secret in its very nature, did not come to light for a long time after most of it

was committed (R. 289–290). Moreover, it is well established that a proceeding on behalf of the Government may not be barred by the doctrine of laches. *Chesapeake and Delaware Canal Co.* v. *U. S.,* 250 U. S. 123, 125; *Board of Commissioners* v. *U. S.,* 308 U. S. 343; *In re Cuban Atlantic Transportation Corp.,* 57 F. (2d) 963 (C. C. A. 2); *N. L. R. B.* v. *Nebel Knitting Co.,* 103 F. (2d) 594 (C. C. A. 4); *Phelps Dodge Corp.* v. *N. L. R. B.,* 113 F. (2d) 202 (C. C. A. 2), affirmed 313 U. S. 177; *U. S.* v. *Nashville,* 118 U. S. 120, 125; *U. S.* v. *Beebe,* 127 U. S. 338, 344; *U. S.* v. *Insley,* 130 U. S. 263, 266. "There is no bar through lapse of time to a proceeding in the public interest to set an industry in order . . ." *F. T. C.* v. *Algoma Lumber Co.,* 291 U. S. 67, 80. The instant proceeding, like all proceedings under the Act, is in the public interest for a public end, not in the interest of the particular claimants. *Amalgamated Utility Workers* v. *Consolidated Edison, Inc.,* 309 U. S. 261, 269; *Agwilines, Inc.* v. *N. L. R. B.,* 87 F. (2d) 146, 150, 151 (C. C. A. 5); *N. L. R. B.* v. *Colten, et al.*, 105 F. (2d) 179, 182–183 (C. C. A. 6). As was stated in *N. L. R. B.* v. *Sun Shipbuilding and Drydock Co.,* 135 F. (2d) 15, 23 (C. C. A. 3), "We are unaware of any rule of law which would justify a court in saying that, because charges are belated, the Board abuses its discretion when it refuses to dismiss a complaint for that reason."

Respondent's reckless charge that Trial Examiner Whittemore conducted the hearing herein in a biased and prejudiced manner is entirely baseless (Brief,

pp. 21–23). The two "illustrative incidents," culled from a record of more than 1,200 printed pages, which are offered in support of this charge fail to show any improper conduct on the Trial Examiner's part. We assert confidently that an examination of the entire record will reveal that the Trial Examiner conducted the hearing with the utmost of fairness and decorum. That fairness and decorum is illustrated rather than refuted by the Bebb incident set forth in respondent's brief (App. C, pp. 52–54). It shows that respondent's counsel, advised beforehand that the witness, Bebb, intended to make a highly inflammatory statement at the hearing, told him "if he wanted to make a statement to go ahead." In allowing this provocative occurrence to pass without further comment the Trial Examiner evidenced extreme judicial calm and restraint.

Respectfully submitted.

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